

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS FRANK URBAN,

Defendant-Appellant.

UNPUBLISHED

August 10, 2006

No. 257728

Otsego Circuit Court

LC No. 04-002999-FC

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions in two separate jury trials of one count of assault with intent to commit murder, MCL 750.83, one count of felonious assault, MCL 750.82, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant's first jury convicted him of felonious assault, but could not reach a verdict on the assault with intent to commit murder and the related felony-firearm charge.¹ Defendant was convicted of these latter charges following his second jury trial. Defendant was sentenced in a single judgment of sentence to concurrent terms of 24 to 48 months for felonious assault, and 180 months to 360 months for assault with intent to commit murder. He was also sentenced to a consecutive two years' imprisonment for felony-firearm, to be served prior to his concurrent sentences for his two assault convictions. We affirm.

Defendant's convictions stem from events that occurred on September 18, 2003. Earlier in the day, defendant and his wife had been involved in a heated dispute. At one point defendant, who had been outside target shooting in his driveway, pointed a gun at his wife as she was attempting to drive away from their home. Thereafter, defendant's wife walked through the woods and called 911.

The police responded and surveilled the home for several hours. One of the state troopers involved testified that, while lying in a berm after dark, he saw a figure approaching. The trooper said he shouted, "don't move!" The trooper testified that, immediately after he told the figure not to move, he heard a shot and saw a muzzle flash aimed in his direction. The trooper

¹ The first jury also acquitted defendant of two counts of assaulting a person performing his or her duties causing bodily injury, MCL 750.81d(2), and two related counts of felony-firearm.

further testified that he turned his flashlight on the figure and saw defendant holding a rifle. The trooper said he ordered defendant to drop the rifle and, after repeating the command several times, the trooper saw defendant drop the rifle. Several troopers then tackled defendant and struggled with him until able to finally subdue and handcuff him. One trooper testified that, after being handcuffed, defendant attempted to reach for two pistols he had in his belt and pocket, which the trooper seized.

Defendant was arrested and charged with crimes arising out of both the incident with his wife and the shooting involving the trooper.

We shall first address defendant's contention that the trial court erred when it permitted the admission of other acts evidence contrary to MRE 404(b).² First, defendant asserts that reversal is required because plaintiff failed to provide notice before either trial that the other acts evidence would be used. See MRE 404(b)(2). Second, defendant argues that testimony by his wife regarding his past threats and behavior and her description of him as "a very angry man" who had told her that he would kill her and hide her body where no one would find her, was improperly admitted at the second trial. Because defendant did not raise these arguments below, our review is for plain error affecting substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

MRE 404(b)(1) sets forth the standards for the admission of other acts evidence. It provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of other acts as evidence is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a "defendant's history of other misconduct rather than upon the evidence of his conduct in the case in issue." *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998), quoting *People v Golochowicz*, 413 Mich 298, 308; 319 NW2d 518 (1982). The rule is one of inclusion, not exclusion. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993). Evidence of character through other acts is excluded only where it is submitted for an improper character to conduct purpose, i.e. to demonstrate that the defendant has bad character and acted in conformity with that character. *Id.* at 63-64.

² In his brief on appeal, defendant frames this issue as one involving the ineffective assistance of counsel and prosecutorial misconduct. However, defendant also claims that, by permitting this evidence to be admitted, the trial court erroneously failed to "correct and control the proceedings." Therefore, we shall first address whether the trial court should have permitted the admission of the other acts evidence.

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *Knox, supra* at 509. A proper purpose is one other than showing the defendant's propensity to commit the offense. *VanderVliet, supra* at 74. The prosecutor has the initial burden of showing the evidence is relevant. *Knox, supra* at 509. Such evidence is unfairly prejudicial if there is a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Further, MRE 404(b)(2) requires a prosecutor to provide reasonable notice in advance of trial "of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence."

Felonious assault is a specific intent crime, *People v Robinson*, 145 Mich App 562, 564; 378 NW2d 551 (1985), and the cited evidence is relevant to proving defendant's intent at the time he allegedly pointed his rifle at his wife. A past history of threats and abuse makes it more likely that defendant meant to put his wife in apprehension of imminent battery when he pointed a loaded rifle in her direction on September 18, 2003. Evidence of intent is a proper purpose for the introduction of other acts evidence. MRE 404(b)(1). Although evidence of defendant's violent tendencies with his wife is clearly prejudicial, its probative value on the issue of intent is significant. Thus, for the first trial, the prior bad acts evidence was admissible under MRE 404(b) as evidence of defendant's intent with respect to the felonious assault charge involving his wife. Further, because defendant failed to state how he would have responded differently to the evidence had he been given prior notice, there is no basis to conclude that the lack of notice had any affect on the first trial. *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001).

However, we conclude that some of the cited testimony was improperly admitted at the second trial, where defendant was not facing a charge of felonious assault for pointing a gun at his wife.³ Plaintiff argues that the challenged evidence was admissible as part of the *res gestae* of the crime. Our Supreme Court has held that evidence of other bad acts is admissible under the *res gestae* exception when it is "so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (internal quotations and citations omitted). Testimony about what had occurred during the day between defendant and his wife is an antecedent event that gives context to the alleged assault with intent to commit murder by explaining the presence of the police and their conduct on defendant's property. However, testimony regarding past threats and violence does not serve to complete the story of the alleged assault with intent to commit murder. In other words, the volatile nature of defendant's relationship with his wife does not have an immediate or direct causal connection with the circumstances surrounding the shooting incident with the trooper. Therefore, the trial court plainly erred when it permitted the admission of this testimony. Nevertheless, we conclude that this plain error does not warrant reversal.

³ Again, absent a showing as to how defendant would have responded differently to the evidence had he been given prior official notice, there is no basis to conclude that the lack of notice affected the outcome. *Hawkins, supra* at 455.

An unpreserved claim of error will not warrant reversal unless the error was plain and outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). It is the defendant who bears the burden of demonstrating that the error was outcome determinative. *Id.* Finally, even if the error was both plain and outcome determinative, reversal will still only be warranted where the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.*

At the first trial, the jury properly heard all of defendant's wife's testimony and upon the conclusion of the trial were unable to reach a verdict on the charge of assault with the intent to commit murder and the related felony-firearm charge. The jury at defendant's second trial heard the same testimony. Although some of that testimony was properly before the jury, some of that testimony should not have been admitted. However, the nature of the inadmissible testimony was not so inflammatory that it is manifest that the jury was improperly swayed by it. Indeed, despite properly hearing the same testimony concerning other acts allegedly committed by defendant, the first jury was still unable to come to a consensus regarding the charge of assault with the intent to commit murder. Further, although the jury at the second trial had substantially the same testimony and evidence as the jury at the first trial, there was one significant difference. At the second trial, the prosecutor presented a video taken at the scene which recreated the shooting. The video portrayed the shooting in both the manner described by the trooper involved in the shooting and the way described by defendant. Testimony accompanying the video evidence also established that the bullet fired into the ground during the demonstration was easily recovered. This was in direct contrast to the bullet actually fired on the night of the shooting, which was never recovered despite a thorough search. This evidence cast doubt on defendant's version of events and likely had a far greater effect on the jury's deliberations than the impermissible other acts testimony. For these reasons, we cannot conclude that the erroneously admitted other acts evidence was outcome determinative. Therefore, this error does not warrant reversal.

Defendant next argues that the prosecutor engaged in misconduct by misstating the elements of felonious assault during the first trial.⁴ Defendant's assertion is both without merit and contrary to the record. Although the prosecutor did not list all of the elements of felonious assault in his opening argument, he did correctly identify the elements in his closing remarks. Further, the court properly instructed the jury on the elements of felonious assault in both its initial jury instructions made following the close of proofs and in the supplemental instruction given in response to a request by the jury. Any minimal prejudice that might have occurred was likely cured by these instructions. *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003).

⁴ Defendant also argues that plaintiff continued to misstate the elements of felonious assault at the second trial. However, defendant does not cite a single example of where this occurred. Further, defendant does not explain how such a misstatement would have affected the outcome of the proceedings given that felonious assault was not tried in the second trial. Therefore, we decline to address this argument. See *People v Van Tubbergen*, 249 Mich App 354, 365; 642 NW2d 368 (2002) ("Issues insufficiently briefed are deemed abandoned on appeal.")

Finally, defendant claims that his trial counsel was constitutionally ineffective. We disagree. Our review of this claim of error is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). In order to show that his trial counsel provided ineffective assistance, defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms, and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338-339; 521 NW2d 797 (1994). Counsel's effectiveness is presumed, and there is a very high burden of proof to show otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Defendant first contends that his trial counsel was ineffective for failing to retrieve the bullet defendant allegedly fired into the ground on the night of the shooting. Defendant does not dispute that the police conducted an investigation of the site where the shooting occurred and does not allege that the search was defective or improper in any way. Hence, on the record before us, we cannot conclude that defendant's trial counsel's investigation would have been anything but cumulative to the police investigation. Consequently, defendant has failed to establish that his trial counsel's performance fell below an objective standard of reasonableness or affected the outcome of the trial.

Defendant also contends that his trial counsel provided ineffective assistance at the second trial by failing to order the transcripts from the first trial. We disagree. Defendant failed to identify any material discrepancies in the prosecution witness' testimony between the two trials. Absent such a showing, defendant cannot demonstrate that the failure to procure the transcripts affected the outcome of the trial.

Defendant's assertion that counsel was ineffective for failing to object to the admission of his post-arrest silence is also without merit. We disagree.

The right against self-incrimination is a right guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. A person's exercise of his right against self-incrimination by remaining silent cannot be used against him at trial. *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973); *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). Therefore, when "a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on the *Miranda* warnings, the use of his silence is error." *People v Schollaert*, 194 Mich App 158, 163; 486 NW2d 312 (1992). However, where a defendant's silence or non-responsive conduct neither occurs during a custodial interrogation nor in reliance on *Miranda* warnings, it is not constitutionally protected and may be used as substantive evidence against him. *Id.* at 166-167.

At the time of the shooting, defendant was not undergoing custodial interrogation. Rather, he was standing in the woods while police officers shouted at him to drop his rifle and get down on the ground. Nothing on the record indicates that defendant's silence was attributable to an invocation of his right to remain silent. Therefore, evidence of defendant's silence immediately after the shooting and after the trooper identified himself was properly

admissible to rebut defendant's assertions that he never pointed the rifle at the trooper and that he accidentally fired the shot after being startled by the trooper. *Id.*⁵ Because this evidence was properly admitted, defendant's trial counsel cannot be faulted for failing to object to it. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant's assertion that counsel was ineffective for failing to object to the admission of the videotaped police recreation of the nighttime muzzle flash also lacks merit. "Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. The demonstrative evidence must be relevant and probative." *People v Bulmer (After Remand)*, 256 Mich App 33, 35; 662 NW2d 117 (2003) (citation omitted). The videotape was relevant and probative. There was conflicting testimony concerning whether the shot in issue was fired into the ground or into the air. The videotape was relevant because it showed whether there was a discernable difference between shots fired from these two different positions, where the muzzle flash was the only evidence of the shot perceptible to the trooper. Further, the video presented a visual demonstration of both defendant's and plaintiff's version of the events. Therefore, because there was no reason for that evidence to have been excluded from trial, any objection to its admission would have been futile. *Fike, supra* at 182.

With respect to failing to raise an objection to testimony from defendant's wife regarding the other acts based on MRE 404(b), we conclude that defendant's trial counsel was not constitutionally ineffective. Defendant's trial counsel did object to the introduction of that testimony on the basis of relevance. The trial court quickly overruled this objection, and there is nothing on the record to indicate that the court would have ruled any differently had counsel framed his objection under MRE 404(b). Finally, as already noted, the erroneous admission of this testimony was not outcome determinative. Therefore, we cannot conclude that defendant's trial counsel's failure to raise a more specific objection under MRE 404(b) affected the outcome of defendant's trial.

There were no errors warranting reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

⁵ Because this evidence was properly admitted, defendant's argument that the prosecution committed misconduct by eliciting and using the testimony regarding defendant's failure to indicate to the police that the shooting was accidental, is without merit.